

1 THE HONORABLE JAMES L. ROBART
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6 U.S. DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
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9 MONTY J. BOOTH, ATTORNEY AT LAW,
10 P.S., a Washington corporation, RICARDO T.
11 MASCARENAS, a Washington resident, and
12 CHRISTOPHER GREGORY, a Washington
13 resident, individually and on behalf of all others
14 similarly situated,

15 Plaintiffs,

16 vs.

17 APPSTACK, INC., a Delaware corporation;
18 STEVE ESPINOSA, individually; and JOHN
19 ZDANOWSKI, individually,

20 Defendants.

21 NO. 2:13-cv-01533-JLR

22 **[PROPOSED] ORDER GRANTING
23 MOTION FOR PRELIMINARY
24 APPROVAL OF CLASS ACTION
25 SETTLEMENT**

26 **Noted on Motion Calendar:
27 August 22, 2016**

28 WHEREAS, on or about August 22, 2016, the Parties entered into a Settlement
29 Agreement and Release (“Agreement”), which sets forth the terms and conditions of the
30 settlement and release of certain claims against Defendants Appstack, Inc., Steve Espinosa, and
31 John Zdanowski (collectively “Defendants”); the Court having reviewed and considered the
32 Agreement and all of the filings, records, and other submissions; the Court finds upon a
33 preliminary examination that the Agreement appears fair, reasonable, and adequate, and that a
34 hearing should and will be held after notice to the Settlement Class in order to confirm that the
35 settlement is fair, reasonable, and adequate, and to determine whether the Settlement Order and

1 Final Judgment should be entered in this Action pursuant to the terms and conditions set forth
2 in the Agreement ("Final Approval Hearing").

3 **THEREFORE, THE COURT FINDS AND CONCLUDES AS FOLLOWS:**

4 1. This Court has jurisdiction over the subject matter of this Action and personal
5 jurisdiction over the Parties and the Settlement Class.

6 2. The Court finds that (a) the Agreement resulted from arm's-length negotiations,
7 with participation of an experienced mediator, and (b) the Agreement is sufficient to warrant
8 notice of the Settlement and the Final Approval Hearing to the members of the Settlement
9 Class.

10 3. Pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, and for the
11 purposes of settlement only, the Settlement Class is preliminarily certified as follows:

12 All persons or entities in the United States who, on or after four
13 years before the filing of this action to July 21, 2016, received a
14 call to their cellular telephone line with a pre-recorded message,
made by or on behalf of Defendants.

15 The Settlement Class does not include any persons who validly request exclusion from
16 the Class.

17 4. For purposes of settlement, the Court hereby appoints Plaintiffs Ricardo T.
18 Mascarenas and Christopher Gregory as "Class Representatives" pursuant to Rule 23 of the
19 Federal Rules of Civil Procedure, and finds that these Class Representatives have and will
20 fairly and adequately protect the interests of the Settlement Class.

21 5. For purposes of settlement, the Court appoints the attorneys at Terrell Marshall
22 Law Group and Gallagher Law Offices, P.S. as Class Counsel and finds that Class Counsel
23 have and will fairly and adequately protect the interests of the Settlement Class.

24 6. The Court preliminarily finds that the Agreement is fundamentally fair,
25 adequate, and reasonable, and that the Settlement Class satisfies the requirements of Rule 23 of
26 the Federal Rules of Civil Procedure as follows:

- 1 a. The number of members in the Settlement Class appears to be so
2 numerous that joinder of all members is impracticable;
- 3 b. There appear to be common questions of law and fact;
- 4 c. The claims of the Class Representatives appear to be typical of the
5 claims of the Settlement Class;
- 6 d. The Class Representatives and Class Counsel appear to be able to fairly
7 and adequately represent and protect the interests of the Settlement Class;
- 8 e. The questions of law and fact common to the members of the Settlement
9 Class appear to predominate over individual questions of law and fact; and
- 10 f. A class action settlement appears to be superior to other methods of
11 adjudication.

12 7. The Court appoints Epiq Systems, Inc. as the Claims Administrator, who shall
13 fulfill the functions, duties, and responsibilities of the Claims Administrator as set forth in the
14 Agreement and this Order.

15 8. The Court approves the proposed forms of notice and notice plan for giving
16 direct notice to the Settlement Class by U.S. Mail as set forth in the Agreement and its attached
17 exhibits (“Notice Plan”). The Notice Plan, in form, method, and content, fully complies with
18 the requirements of Rule 23 and due process, constitutes the best notice practicable under the
19 circumstances, and is due and sufficient notice to all persons entitled thereto. The Court finds
20 that the Notice Plan is reasonably calculated to, under all circumstances, reasonably apprise the
21 persons in the Settlement Class of the pendency of this action, the terms of the Agreement, the
22 right to object to the settlement and to exclude themselves from the Settlement Class, and the
23 process for submitting a claim for monetary relief.

24 9. Pursuant to the Agreement, the Claims Administrator shall provide individual
25 notice via U.S. Mail to the most recent mailing address of the Settlement Class no later than
26 September 28, 2016, which is thirty (30) days following entry of this Order.

1 10. Members of the Settlement Class may exclude themselves from the Settlement
 2 Class by advising the Claims Administrator in writing no later than November 28, 2016 ("Opt-
 3 Out Deadline"), which is sixty-one (61) days after the date notice is sent to the Settlement
 4 Class. All such writings must be signed, and if mailed, must be postmarked no later than the
 5 Opt-Out Deadline.

6 11. Any Settlement Class Member who desires to object to the fairness of this
 7 settlement must file a written objection with the Court by November 28, 2016 ("Objection
 8 Deadline"), which is sixty-one (61) days from the date notice is mailed to the Settlement Class.
 9 The objection must provide the objector's name, address, telephone number at which the calls
 10 were received, and the reason(s) for the objection.

11 12. Anyone who properly objects, as described herein, may appear at the Final
 12 Approval Hearing, including through an attorney hired at the objector's expense. Such
 13 objectors or their attorneys intending to appear at the Final Approval Hearing must file a notice
 14 of appearance with this Court no later than ten (10) days prior to the Final Approval Hearing.
 15 Any member of the Settlement Class who fails to comply with this provision shall waive and
 16 forfeit any and all rights to appear and/or object separately, and shall be bound by the terms of
 17 this settlement and the orders and judgments of this Court. Class Counsel shall file responses
 18 to any valid objections no later than fourteen (14) days prior to the Final Approval Hearing.
 19 Defendants' counsel also may file responses, but no later than fourteen (14) days prior to the
 20 Final Approval Hearing.

21 13. The Court approves the claims procedures set forth in the Agreement. The
 22 Court approves the form and content of the Claim Form substantially in the form attached as
 23 Exhibit C to the Agreement. A properly executed Claim Form must be submitted as required in
 24 the Notice over the Internet or postmarked by a date specified in the Class Notice.

25 14. Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure a hearing will be
 26 held before this Court to finally determine whether the prerequisites for class certification and
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1 treatment under Rule 23(a) and (b) of the Federal Rules of Civil Procedure are met; to
 2 determine whether the settlement is fair, reasonable, and adequate, and should be approved by
 3 this Court; to determine whether the Settlement Order and Final Judgment under this settlement
 4 should be entered; to consider the application for attorneys' fees and expenses of Class
 5 Counsel; to consider the application for service awards to the class representatives; to consider
 6 the distribution of the Settlement Fund pursuant to the Agreement; and to rule on any other
 7 matters that the Court may deem appropriate. At the Final Approval Hearing, the Court may
 8 enter the Settlement Order and Final Judgment in accordance with the Agreement that will
 9 adjudicate the rights of the Settlement Class Members.

10 15. The Final Approval Hearing is scheduled for Wednesday, January 11, 2016, at
 11 2:00 p.m. The Hearing will occur at 700 Stewart Street, Seattle, Washington 98101, in
 12 Courtroom 14106.

13 16. All memoranda and other submissions in support of the Settlement shall be filed
 14 no later than fourteen (14) days prior to the Final Approval Hearing, including proof of
 15 compliance with the notice provisions of the Class Action Fairness Act of 2005 ("CAFA"), 28
 16 U.S.C. § 1715.

17 17. All notice and Settlement Administration expenses shall be paid from the
 18 Settlement Fund pursuant to the Agreement.

19 18. On or before thirty (30) days after the Notice Date, Class Counsel shall file and
 20 serve an application for an award of attorneys' fees and out-of-pocket costs, and an application
 21 for service awards to Plaintiffs. The application shall be posted on the Settlement Website
 22 within twenty-four hours after the day it is filed.

23 19. On or before fourteen (14) days prior to the Final Approval Hearing, Class
 24 Counsel shall file and serve a motion for final approval and responses to any objections.

25 20. All members of the Settlement Class will be bound by all orders pertaining to
 26 the settlement unless such persons request exclusion from the Settlement Class. Members of
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1 the Settlement Class who do not timely and validly request exclusion shall be so bound, even if
 2 they have previously or subsequently initiated individual litigation or other proceedings against
 3 the Released Parties relating to the Release Claims.

4 21. Settlement Class Members do not need to appear at the Final Approval Hearing
 5 or take any other action to indicate their approval and partake in this settlement.

6 22. This Order and the settlement are not admissions or concessions by Defendants
 7 of any liability or wrongdoing. This Order is not a determination of liability or wrongdoing.
 8 This Order also does not constitute any opinion or position of this Court as to the merits of the
 9 claims and defenses related to this Action.

10 23. This Action is stayed until further ordered by this Court, except such actions and
 11 proceedings that may be necessary to implement this Settlement and issue a Final Approval
 12 Order and Judgment.

13 24. Pending final determination of whether the settlement should be approved,
 14 Plaintiffs, all Settlement Class Members and any person or entity allegedly acting on behalf of
 15 Settlement Class Members, either directly, representatively or in any other capacity, are
 16 preliminarily enjoined from commencing or prosecuting against the Released Parties any action
 17 or proceeding in any court or tribunal asserting any of the Released Claims, provided, however,
 18 that this injunction shall not apply to individual claims of any Settlement Class Members who
 19 timely exclude themselves in a manner that complies with this Order. This injunction is
 20 necessary to protect and effectuate the settlement, this Order, and the Court's flexibility and
 21 authority to effectuate this settlement and to enter judgment when appropriate, and is ordered in
 22 aid of the Court's jurisdiction and to protect its judgments pursuant to 28 U.S.C. § 1651(a).

23 25. If Final Approval does not occur, the parties shall be returned to the status quo
 24 ex ante, for all litigation purposes, as if no settlement had been negotiated or entered into and
 25 thus this Order and all other findings or stipulations regarding the settlement, including but not
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1 limited to, certification of the Settlement Class shall be automatically void, vacated, and treated
 2 as if never filed.

3 26. Counsel for the parties are hereby authorized to utilize all reasonable procedures
 4 in connection with the administration of the settlement which are not materially inconsistent
 5 with either this Order or the terms of the Settlement Agreement.

6 27. This Court retains jurisdiction to consider all further matters arising out of or
 7 connected with the settlement. The Court reserves the right to adjourn or continue the date of
 8 the Final Approval Hearing without further notice to Settlement Class Members, and retains
 9 jurisdiction to consider all further applications arising out of or connected with the settlement.
 10 The Court may approve or modify the settlement without further notice to Settlement Class
 11 Members.

12 28. The following timeline will govern proceedings through the Final Approval
 13 Hearing:

Ten days after entry of this Order	Deadline to serve CAFA Notice
Thirty days after entry of this Order	Deadline to mail notice
Seven days after entry of this Order	Deadline to make the Settlement Website available
Sixty days after entry of this Order	Deadline for Class Counsel to file fee petition and request for service awards
Ninety-one days after entry of this Order	Deadline for Settlement Class Members to submit claims, exclusion requests, and objections
Fourteen days before Final Approval Hearing	Deadline to file responses to objections and motion for final approval
January 11, 2016, at 2:00 p.m.	Final Approval Hearing

IT IS HEREBY ORDERED.

DATED this 29 day of August, 2016.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Jennifer Rust Murray, hereby certify that on August 28, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Attorneys for Defendants

DATED this 28th day of August, 2016.

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